IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT R. D. TIMPANY, TRUSTEE IN REORGANIZATION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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Counter-Statement of Questions Presented

Whether Petitioners have advanced special or important reasons for reviewing, in a dispute which events have

rendered moot, either the Reorganization Court's discretionary refusal to grant relief from a validly imposed stay or the Reorganization Court's determination as to the finality of certain ICC orders.

Counter-Statement of the Case

In early 1971, shortly after assuming his duties as Trustee in Reorganization of the CNJ, Respondent evolved a program known as the Blueprint for Survival to resolve the cash crisis confronting the estate and provide a reasoned basis upon which the CNJ could continue to provide essential rail services in the future. As pertinent here, the Blueprint sought to shrink the configuration of the CNJ by abandoning all of its Pennsylvania operations, shifting from Pennsylvania to New Jersey its points of interchange with other railroads of traffice originating on, terminating on, and bridging CNJ's proposed area of reduced configuration. CNJ's Pennsylvania operations were largely over the Lehigh & Susquehanna Railroad (L&S) on a long-term lease from the Lehigh Coal & Navigation Co. (LCN).

To implement the Blueprint, Respondent filed an abandonment application with the ICC (which was assigned Finance Docket No. 26659), entered into negotiations with carriers for the establishment of new interchange points (which led to the tariff routing case assigned Investigation & Suspension Docket No. 8667) and entered into negotiations with LCN to resolve claims between the parties including those pertaining to the termination of the existing lease of the L&S. LV applied to the ICC to take over CNJ's Pennsylvania operations.

In August of 1971 the ICC granted a small portion of the abandonment application; the Reorganization Court,

by Order No. 451, authorized the abandonment of the segments involved, pursuant to §77(o) of the Bankruptcy Act, in January of 1972; and the Third Circuit affirmed the §77(o) order which had been challenged on appeal by petitioners. 455 F. 2d 990 (3d Cir. 1972).

In November of 1971 Respondent and LCN entered into a settlement agreement providing in part for a $500,000 payment by the CNJ estate to LCN and the exchange of general releases, conditioned upon the entry by the ICC of final orders permitting abandonment of CNJ's operation of the L&S; the Reorganization Court entered an order approving the terms of the settlement; and this order was affirmed by the Third Circuit on an appeal brought by Petitioners here. 455 F. 2d 988 (3d Cir. 1972). In December of 1972 the Reorganization Court entered an order (No. 445) authorizing the Debtor to suspend on April 1, 1972 all operations in the State of Pennsylvania pending the outcome of its abandonment applications then before the ICC and enjoining all parties from maintaining any action affecting the operations (or the cessation or abandonment thereof) of the Debtor in Pennsylvania in any court other than the Reorganization Court without first obtaining leave to do so. This order was challenged on appeal by Petitioners and was affirmed by the Third Circuit, 455 F. 2d 989, cert. den. 409 U. S. 889 (1972).

On April 1, 1972 CNJ ceased its Pennsylvania operations; and the LV stepped in with alternative service to CNJ's Pennsylvania customers under a new lease arrangement with LCN. On May 26, 1972 the ICC issued two reports and orders both bearing service date of June 2, 1972 and resolving the interrelated abandonment and routing proceedings. 341 ICC 129; 342 ICC 227. The two reports and orders were explicitly interdependent, providing for the Pennsylvania abandonments, new in-

terchange points in New Jersey, various traffic protective arrangements and the establishment of certain through train service. Shortly after the two ICC reports and orders were served, Respondent filed in the Reorganization Court a single petition to obtain pursuant to §77(o) of the Bankruptcy Act court authorization for the abandonments and compliance with the interrelated conditions of the ICC abandonment and routing orders. The authorization was granted by Order No. 514 entered on July 5, 1972 from which Petitioners did not appeal. The Trustee thereafter irrevocably changed the status quo by implementing all of the conditions and other terms of the ICC and court orders.

In November of 1972 Petitioners applied to the Reorganization Court pursuant to the stay provisions of Order No. 445 for leave to review in the Middle District of Pennsylvania portions of the ICC abandonment order decided on May 26, 1972. The hearing on the motion was held on December 11, 1972 at which time Petitioners orally expanded their request to include leave to appeal the ICC routing orders as well.

Petitioners' motion was heard along with a motion which had been filed by LCN seeking payment of the $500,000 in settlement proceeds and asserting, *inter alia,* the finality of the ICC orders which under the settlement agreement was the condition precedent for such payment. The Reorganization Court, in the exercise of its discretion, refused to grant Petitioners leave from the stay provisions of Order No. 445 to review the ICC orders in the Middle District of Pennsylvania; and it entered Order No. 550 denying Petitioners' motion. Thereafter it entered Order No. 583 determining that the ICC orders involved were final and directing the Trustee to consummate the settlement with LCN.

Order Nos. 550 and 583 were affirmed on appeal; and Petitioners' application for a rehearing on Order No. 550 was denied. The petition for certiorari followed.

ARGUMENT

On April 1, 1972 CNJ temporarily suspended its Pennsylvania operations and LV assumed such operations. By orders of August 20, 1971 and May 26, 1972 the ICC authorized the abandonment by CNJ of all of its Pennsylvania operations and the establishment of certain routtings subject to compliance with an elaborate set of conditions. On January 11, 1972 by Order No. 451 and July 5, 1972 by Order No. 514 the CNJ Reorganization Court authorized abandonments of all of CNJ's Pennsylvania operations and compliance with the elaborate set of conditions contained in the aforementioned ICC orders. Shortly after the entry of Order No. 514 Respondent fully complied with the conditions and fully abandoned all of its Pennsylvania operations.

Petitioners opposed CNJ's departure from Pennsylvania. However, they did not obtain a stay of the temporary suspension of operations occurring on April 1, 1972 and did not seek a stay of the final abandonment. Moreover, they appealed Order No. 451 and lost and never appealed Order No. 514. CNJ has been out of Pennsylvania for almost two years; and LV has provided alternative services. Events have rendered moot the dispute of which the within petition for certiorari is the dying gasp. *Requiescat in pace.*

When the Reorganization Court entered Order No. 550 refusing, as an exercise of discretion, to grant leave from the stay provisions of Order No. 445 for Petitioners to review the ICC orders of May 26, 1972 in the Middle District of Pennsylvania, it had before it:

(a) The LCX motion giving rise to Order No. 583 requiring it to pass upon the finality of the ICC orders in a manner which would bind Petitioners since the Commonwealth of Pennsylvania is a party intervenor to the CNJ reorganization proceeding. Finality was certain to be an issue in Petitioners' proposed suit in the Middle District of Pennsylvania;

(b) Serious questions as to whether any right of review still existed in view of (1) the fact that Order No. 514 had become final without appeal; (2) the language concerning finality in §77(o); (3) the expiration of the limitation period contained in 28 U.S.C. 1336(c); and (4) the fact that events had mooted the underlying dispute;

(c) Serious doubts existed, even if the right to review were still alive, as to whether a three-judge court had any jurisdiction at all to hear such matter in view of the exclusive jurisdiction and venue conferred upon a referral court by 28 U.S.C. 1336(b) and 1398(b) and in view of settled case law indicating the inapplicability of the Urgent Deficiencies Act to cases not involving urgent public issues of widespread effect. *United States* v. *Griffin*, 303 U. S. 226 (1938); *United States* v. *ICC*, 337 U. S. 426 (1949); *Bondholders' Protective Committee* v. *ICC*, 432 F. 2d 268 (3d Cir. 1970);

(d) Even if there were jurisdiction with matters like the Blueprint in a statutory three-judge court, the *New Haven Inclusion* Cases, 399 U. S. 392 (1970) clearly established the concurrent and preferred jurisdiction of the Reorganization Court in matters like the Blueprint of crucial significance to the reorganization proceeding.

Under such circumstances the refusal to grant leave was not a clearly erroneous exercise of discretion and does not present special and important reasons justifying the

grant of a Writ of Certiorari. Nor does the determination of finality contained in Order No. 583. The mootness of the dispute, the expiration of the appeal period for Order No. 514, and the running of the 90-day statute of limitations contained in 28 U.S.C. 1336(e)—all underscore the finality which the Court found.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March, 1974